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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 511

JAMES E. BUSH,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR THE PETITIONER

Citations to Opinion Below

The opinions of the Texas Court of Criminal Appeals (R. 152-157, 159-160) are reported at 353 S.W.2d 855.

Jurisdiction

The judgment of the Texas Court of Criminal Appeals was entered on January 3, 1962 (R. 158). A timely petition for rehearing filed on January 18, 1962 (R. 158-159) was denied on February 14, 1962 (R. 160). The judgment is final and is from the court of last resort in Texas in criminal cases (R. 161). A motion for leave to proceed *in forma pauperis* and a petition for certiorari were filed May 7, 1962, and granted October 15, 1962 (R. 162). The juris-

diction of this Court rests on 28 U.S.C. §1257(3), since petitioner claims a right under the Constitution of the United States.

Question Presented

Does the Fourteenth Amendment require in a criminal prosecution of an indigent defendant previously adjudicated to be insane that the court commit him to a mental hospital for examination, or provide funds for employment of a psychiatrist, or otherwise make available to the jury and to court-appointed counsel for the defendant psychiatric evidence as to the defendant's present sanity?

Constitutional Provision Involved

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Petitioner was convicted of felony theft in the District Court of Ellis County, Texas. There was evidence from which the jury could have found that petitioner stole a collection of old coins, worth about $600, from his employer (R. 93). On proof of two prior convictions for theft, petitioner was sentenced to life imprisonment as an habitual offender (R. 17-19).

On February 14, 1924, petitioner, then 24 years old, was adjudicated to be insane by a jury in Navarro County, Texas. The jury found that insanity was hereditary in petitioner's family, that he had had about 15 attacks of insanity in the preceding six months, and that it was necessary that he be placed under restraint (Def. Ex. 1; R. 147-152, 123). This judgment that petitioner was insane has never been vacated or otherwise set aside (R. 54).*

The crime in question was alleged to have taken place on October 21, 1960 (R. 2). An indictment was returned February 7, 1961 (R. 1-3) and trial was set for April 24, 1961. About three weeks before the date set for trial the court appointed an attorney for petitioner, who was indigent (R. 34). On April 21st the court-appointed attorney made two motions. In each he recited petitioner's prior adjudication as insane, and that petitioner was without funds to pay for psychiatric tests, examinations, and evaluations necessary to his defense of insanity. In the first motion he asked that petitioner be sent to a mental institution for diagnosis and observation before being placed on trial (R. 3-4). In the other motion he asked alternatively that the court appoint and pay for a competent independent psychiatrist's services (R. 5-6). Both motions were refused. In the trial judge's words: "Nothing showed the defendant to be insane and the Court had no fund or money for so-called psychiatrists, alienists, quacks or specialists" (R. 38).

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* In post-trial proceedings the trial judge twice stated (R. 35, 38) that after being adjudicated insane in 1924, petitioner was released from the state hospital after a very short time and "pronounced sane at all times." There is no evidence in the record to that effect. The County Attorney twice attempted to suggest such a state of facts by leading questions to witnesses (R. 52, 64), but in each case the witness answered that he did not know this to be the fact.

On April 24th, the date set for trial, petitioner availed himself of his right under Texas law to a preliminary trial on the issue of his mental competency at the time of trial and at the time of the alleged commission of the offense charged (R. 6). The jury for this hearing found petitioner to be sane both then and when the alleged crime was committed (R. 8). To rebut the presumption of continuing insanity which, under applicable Texas law, arose from the unvacated 1924 adjudication (R. 7), the state introduced testimony that petitioner was sane from the sheriff (R. 53-54), a police captain (R. 66), a deputy sheriff (R. 67-68), and a Dr. John Compton, the county medical officer (R. 57-65). Dr. Compton based his testimony on two limited consultations with petitioner, one in the doctor's office and one in the jail (R. 57-58). He testified that his studies in medical school had included psychiatry, but that he had no specialized training in that field (R. 64). At the trial on the merits Dr. Compton also testified that in his private practice he treats patients with a mild emotional problem himself, but that he refers more difficult psychiatric cases to a specialist (R. 136). At this preliminary hearing the defense offered the testimony of Dr. James A. Dyal, an assistant professor of psychology at Southern Methodist University (R. 68-74). Dr. Dyal, who had agreed to come to the trial with no fee except his gasoline expenses (R. 74), was permitted to examine petitioner for only 20 minutes (R. 70), since the court required that the examination be made during a brief luncheon recess (R. 65). Dr. Dyal testified that on the basis of such an inadequate examination he could not give an opinion as to petitioner's sanity (R. 70).

The trial on the merits was held on the following day, April 25th (R. 90). On the issue of insanity, the evidence was the same as at the preliminary hearing, except that:

the testimony of the jailer that petitioner was sane (R. 124-125) was substituted for the testimony of the police captain who had ventured this guess a day before; the psychologist, Dr. Dyal, was not recalled; and the state was permitted to read into evidence the judgment that petitioner was sane resulting from the sanity hearing the day before (State Ex. 16; R. 146-147, 133-134). The principal testimony on sanity again came from the county medical officer, Dr. Compton, and was similar to his testimony at the preliminary sanity trial (R. 134-139). During the trial on the merits the defense moved that proceedings be suspended until petitioner could be sent to a mental institution for closer observation, or in the alternative that the court appoint a psychiatrist or psychologist to examine petitioner and evaluate his mental condition in view of the 1924 judgment of insanity. The court responded by saying that he would appoint the county health officer, Dr. Compton, who had testified for the state the day before and was about to testify for the state again (R. 131). So far as the record shows, this "appointment" was not taken seriously by anyone concerned, and Dr. Compton made no further examination of petitioner.

The jury found petitioner guilty and he was sentenced to life imprisonment (R. 17-19). A motion for new trial, in which the refusal to provide for psychiatric examination of petitioner was assigned as error (R. 20), was denied (R. 22). The Court of Criminal Appeals affirmed the conviction (R. 152-160), and specifically rejected petitioner's claim that the Fourteenth Amendment gave him the right to some form of psychiatric assistance (R. 159-160).

Summary of Argument

I. Petitioner, having been adjudicated to be insane in 1924, is presumed insane under Texas law. The only testimony in the present proceeding as to his sanity, on the basis of which the jury found him sane, was from lay witnesses and from the county medical officer, who lacked any specialized training in psychiatry. The symptoms of insanity are elusive and often deceptive. There is a substantial consensus, not only among medical experts but also among legal writers and courts, that a doctor without specialized training in psychiatry is not competent to detect these symptoms and to determine the sanity of a criminal defendant. Even where examination is made by a qualified doctor, the examination must be of substantial duration and include a variety of diagnostic procedures. The two limited "consultations" the county medical officer had with petitioner were not sufficient to determine petitioner's mental condition, even if the officer had had the necessary training and experience to form an opinion on this subject.

II. It is widely recognized that the only satisfactory procedures for determining the sanity of an accused person are his commitment to a mental hospital for observation, or the appointment of qualified psychiatrists to examine him. In 23 states, as well as in the federal courts and the District of Columbia, statutes provide for one or both of these methods of examination, while 10 other states provide by statute for the appointment of qualified persons to examine a defendant as to his sanity but do not specify that the examination must be by psychiatrists. These statutes have been widely praised as a valuable aid to justice by the courts which administer them and by those who have observed these procedures in operation. Every professional

group, whether legal or medical, which has studied the determination of sanity in criminal cases recommends one or both of these procedures.

III. The Fourteenth Amendment requires that the states give a criminal defendant an adequate opportunity to sustain the plea of insanity. Where the defendant is without funds to retain psychiatrists, the state must make provision for psychiatric examination of the defendant if he is to have such an opportunity to sustain his plea. A proceeding which finds a man sane, and results in a life sentence to the penitentiary, in the absence of any qualified expert evidence as to his sanity, is lacking in fundamental fairness. The right to court-appointed counsel of an indigent in such a case is meaningless if counsel is without funds to obtain, and the court refuses to provide, the kind of evidence which is indispensable to a just resolution of the sanity issue. Failure to provide for psychiatric examination where defendant is indigent makes the plea of insanity a "rich man's defense." Where the kind of trial a man gets depends on the amount of money he has, there is a denial of equal protection of the laws.

ARGUMENT

I.

In the Absence of Psychiatric Testimony Based on an Adequate Examination, No Meaningful Judgment as to Petitioner's Sanity Was Possible.

In Texas, as elsewhere, petitioner could not lawfully be tried if he were not mentally competent at the time of trial. He could not lawfully be convicted if he were insane at the time of the acts alleged. Insanity is recognized as a complete defense to a charge of crime. *Texas Penal Code*, Art. 34. Further, under the Texas law applicable to this petitioner, there is a continuing presumption of insanity since the 1924 judgment that he was insane has not been vacated. Though the 1957 Mental Code provides a different rule as to those who have been discharged from a mental institution, *Acts 1957*, 55th Leg., p. 505, c. 243, §83; *Texas Civil Statutes*, Art. 5547-81(b), this new rule has been held not applicable to a criminal defendant discharged from a mental hospital before the effective date of the 1957 statute. *Amos* v. *State*, 331 S.W.2d 225 (Tex. Cr. App. 1960). Indeed subsequent to the effective date of the new act the Texas Court of Criminal Appeals has held there is a continuing presumption of insanity with regard to this very petitioner, *Ex parte Bush*, 313 S.W.2d 287 (Tex. Cr. App. 1958), and the juries were charged, as was required, that petitioner was presumed insane (R. 7, 15-16).

To discharge its burden of proving beyond a reasonable doubt that petitioner was sane, despite the presumption to the contrary, the state relied, both at the insanity hearing and at the trial on the merits, on the testimony of three lay witnesses (R. 53-54; 66, 67-68; 124-125, 132-133) and of the county medical officer, Dr. John Compton (R. 57-65; 134-139). The testimony of lay witnesses requires no com-

ment. Though admissible in evidence, it is hardly sufficient to provide a basis for an informed judgment as to petitioner's sanity. Indeed this is well recognized in Texas, where it is stated in the Constitution that no person shall be committed to a mental hospital in a civil proceeding "except on competent medical or psychiatric testimony." *Texas Constitution*, Art. 1, §15a. If lay testimony is an insufficient basis for committing a person to a mental hospital for treatment, it is surely an insufficient basis on which to send a person to the penitentiary for life. The testimony of Dr. Compton, however, requires more detailed consideration.

This Court has referred to "the elusive and often deceptive symptoms of insanity." *Solesbee* v. *Balkcom*, 339 U.S. 9, 12 (1950). The Court thereby recognized what psychiatrists have long known. Years ago Dr. Isaac Ray spoke of "the delicate shades of disorder" in "that broad, debatable ground that lies between unquestionable sanity and unquestionable insanity." Ray, *Treatise on the Medical Jurisprudence of Insanity* §630 (5th ed. 1871). An English forensic psychiatrist of the nineteenth century of equal if not even greater stature than Ray, Dr. Henry Maudsley, wrote that "there can be no doubt that there do exist cases of insanity in which the intellectual derangement is scarcely, if at all, apparent; and, furthermore, that some of the most dangerous forms of the disease are of this kind—most dangerous, indeed because the insanity displays itself not in thought but in acts." Maudsley, *Responsibility in Mental Disease* 69 (Intl. Scientific Series ed. 1884). More recently Dr. Lowell S. Selling, who had much experience with these problems as director of the Psychopathic Clinic of the Detroit Recorder's Court, observed:

> The vast majority of mentally sick individuals who have committed serious offenses and who are brought

> to trial are close to the borderline. Their symptoms are such that the layman, and oftentimes even the psychiatrically inexperienced physician, cannot recognize their problem.

Selling, *Forensic Psychiatry*, 38 J. Crim. L. & Criminology 606, 611 (1949). The testimony of Dr. Compton must be examined to see if his experience, and his examination of petitioner, were sufficient to qualify him to detect the elusive and deceptive symptoms of insanity.

Dr. Compton is a general practitioner. He testified that his training included psychiatry, but that he had had no specialized training in that branch of medicine (R. 64). He testified also that in his own practice he treats patients with a mild emotional problem himself, but that he refers those with more difficult problems to a specialist (R. 136).

More than a century ago the pioneer American psychiatrist, Dr. Isaac Ray, expressed his view of the testimony of a person with Dr. Compton's limited background on such a difficult question as insanity:

> It is not enough that the standing of the medical witness is deservedly high in his profession, unless it is founded on extraordinary knowledge and skill relative to the particular disease, insanity. Lunatic asylums and retreats for the insane have so multiplied in our country, that patients of this class are almost entirely taken away from the management of the private physician and consigned to the more skilful conductors of these institutions; so that many a medical man may spend a life of full practice without having been intrusted with the care of a dozen insane persons. To such, therefore, a practical knowledge of the disease is out of the question, and thus the practical inducement is wanting to become acquainted with the labors of those

> who have enjoyed better opportunities. If a particular class of men only are thought capable of managing the treatment of the insane, it would seem to follow, as a matter of course, that such only are capable of giving opinions in judicial proceedings relative to insanity. True, in important cases the testimony of one or more of this class is generally given; but it may be contradicted by that of others utterly guiltless of any knowledge of the subject, on which they tender their opinions with arrogant confidence—for ignorance is always confident—and the jury is seldom a proper tribunal for distinguishing the true from the false and fixing on each its rightful value. An enlightened and conscientious jury, when required to decide in a case of doubtful insanity which is to determine the weal or woe of a fellow-being, fully alive to the delicacy and responsibility of their situation and of their own incompetence unaided by the counsels of others, will be satisfied with nothing less than the opinions of those who have possessed unusual opportunities for studying the character and conduct of the insane and have the qualities of mind necessary to enable them to profit by their observations. If they are obliged to decide on professional subjects, it would seem but just and the dictate of common sense that they should have the benefit of the best professional advice. This, however, they do not always have; and consequently the ends of justice are too often defeated by the high-sounding assumptions of ignorance and vanity.

Ray, *Treatise on the Medical Jurisprudence of Insanity* 28 (1st ed. 1838). What was true when Isaac Ray wrote is not less true today, as psychiatry has become a more complex science and the medical schools have failed to keep pace. Dr. Ray's words were echoed in our time by Dr. Winfred Overholser:

> If we review the historical evolution of expert testimony, it seems elementary to say that the courts should insist on qualifications. In general, they assume that any physician may testify on any topic in the field of medicine. In the field of psychiatry this is certainly unrealistic, in view of the wholly inadequate training in psychiatry which medical students, until very recently at least, have received, and the all-too-general lack of interest of the medical profession which still prevails in the matter of mental disorder.

Overholser, *The Psychiatrist and the Law* 128 (1953). For the reasons given by Dr. Ray and Dr. Overholser, psychiatrists are agreed that general practitioners, or specialists in other branches of medicine, are not qualified to give expert opinion, by either training or experience, on the mental status of prisoners. Strauss, *The Qualification of Psychiatrists as Experts in Legal Proceedings*, 2 L. & Contemp. Prob. 461, 463 (1935); Weihofen, *Mental Disorder as a Criminal Defense* 276-277 (1954); Williams & Elliott, *Court Procedure and Subsequent Treatment in Case of the Criminal Insane*, 35 J. Crim. L. & Criminology 233, 238 (1944). This is but a particular application of the general principle that the standards of the hospital and of the medical school must be brought into the courtroom, and that "the judge who takes the next train for Mayo Clinic or Menninger Foundation, in event of personal illness, should hold to the same scientific standards in admitting and evaluating medical opinion." Smith & Hubbard, *Doing Scientific Justice: Psychological Reactions to Traumatic Stimuli* (1962), U. Ill. L.F. 190, 206.

This has not been an easy lesson for the courts to learn. Typical of the older attitude is *Holland* v. *State*, 80 Tex. Cr. R. 637, 192 S. W. 1070 (1917). There the trial court refused to permit expert testimony as to sanity from a county

health officer, who said that he had read about insanity in connection with other diseases in his course of study, but that he had not given it special study and he did not hold himself out as an expert on insanity or mental conditions of the mind. The appellate court held that it was reversible error to refuse to permit expert testimony from a doctor who recognized his own limitations and claimed no expertness. Not a little of the same attitude was evidenced by the trial judge in the present case when he referred in a derogatory fashion to "so-called psychiatrists, alienists, quacks or specialists" (R. 38).

Though the lesson that the general practitioner is not qualified to give expert testimony as to sanity has not been an easy one, the courts have been learning it. "The suspicion that judges have of psychiatry and mental hospitals in general still exists, but decreases steadily in most areas of the country." Ewalt, Strecker & Ebaugh, *Practical Clinical Psychology* 98 (8th ed. 1957). This is demonstrated by cases holding that there should be a directed verdict of not guilty by reason of insanity where psychiatric testimony that defendant was insane has not been met with similarly weighty evidence to the contrary. E.g., *Wright* v. *United States*, 250 F.2d 4 (D.C. Cir. 1957); *Fielding* v. *United States*, 251 F.2d 878 (D.C. Cir. 1957). One commentator believes that the cited cases presage a requirement that the prosecution present psychiatric evidence whenever the defendant's responsibility for his actions is in issue. Note, 58 Col. L. Rev. 1253, 1261 (1958). The learning of this lesson is demonstratd by an Eighth Circuit decision holding that the appointment of a general practitioner to examine a federal prisoner, rather than a psychiatrist, as the statute, 18 U.S.C. §4244, requires, was so fundamental an error as to permit collateral attack under 28 U.S.C. §2255. *Krupnick* v. *United States*, 264 F.2d 213,

218 (8th Cir. 1959). It is demonstrated by the recent sharp division within the District of Columbia Circuit as to whether clinical psychologists, with training and experience in dealing with mentally ill persons far superior to that of Dr. Compton, are qualified to give expert testimony in the field of mental disorder. *Jenkins* v. *United States*, 307 F.2d 637 (D.C. Cir. 1962). See Hoch & Darley, *A Case in Court*, 17 American Psychologist 623 (1962). It is demonstrated by a South Carolina case where the trial court refused to commit defendant to the state hospital for examination by specialists, and instead named two reputable local physicians to make the examination. The South Carolina Supreme Court said that such an examination was "as might well have been apprehended, distinctly inadequate," and that the trial court's action was reversible error. *State* v. *Jones*, 201 S.C. 403, 408, 23 S.E.2d 387, 389 (1942). It is demonstrated by the recent observation of the late Judge Calvin Chesnut that "in the absence of specific obviously unusual events tending to indicate, even to a layman, unsound mentality, legal criminal responsibility for acts is necessarily a problem for expert psychiatrists." *United States* v. *McGann*, 202 F. Supp. 945, 949 (D.C. Md. 1962).

To require a jury to reach a judgment as to petitioner's sanity on the basis of the opinion of one with the limited training and experience of Dr. Compton would be, in Isaac Ray's words, to permit the ends of justice to be defeated "by the high-sounding assumptions of ignorance and vanity."

Even if Dr. Compton were qualified to diagnose mental responsibility, the examinations he made of petitioner were too cursory to permit such a diagnosis. The requisites of an adequate mental examination have often been stated. See, *e.g.*, Ewalt, Strecker & Ebaugh, *Practical Clinical Psychology* 75-98 (8th ed. 1957); Weihofen, *Mental Disorder*

as a Criminal Defense 335 (1954); *Williams* v. *United States*, 250 F.2d 19, 23 (D.C. Cir. 1957). A recent article by Dr. Winfred Overholser gives a fair summary of what proper psychiatric practice requires:

> There may be a very few cases in which a glance even by an untrained person will satisfy the observer that the subject is mentally deranged, but these cases are rare indeed. A proper examination calls first of all for a physical examination and if possible an electroencephalogram to determine from what are colloquially known as "brain waves" whether or not there is a tendency toward epilepsy or some other gross abnormality of the brain. The presence or absence of gross neurological changes should be tested. A reasonably full history of the individual is essential, together with various psychological tests; the history should be obtained from the subject himself and from outside sources. * * * The psychiatrist, whether examining an alleged offender or a private patient in his office, will take into consideration the entire body of symptoms and signs in an attempt to understand why the individual conducts himself and feels as he does. For this purpose several interviews or a period of observation in a mental hospital may be necessary.

Overholser, *Criminal Responsibility: A Psychiatrist's Viewpoint*, 48 A.B.A.J. 527, 529 (1962).

Plainly this is not a short or an easy process. Even the most eminent specialist cannot be sure that a defendant is mentally responsible "on the basis of a peremptory examination of thirty or forty-five minutes' duration." Kreutzer, *Re-examination of the Briggs Law*, 39 Bos. U.L. Rev. 188, 198 (1959). A staff psychiatrist at St. Elizabeth's Hospital observes:

> For the purpose of demonstrating the presence of insanity, upon which a man's life may depend, psychiatric examinations of prisoners awaiting trial are altogether too brief. A one or two hour examination barely elicits the more immediate information. * * * Only a psychiatric examination which permits the reconstruction of the patient's entire life history, including emotional development, can enable a psychiatrist to report properly to the court. Such an examination would require at least twenty-five to thirty hours. It would be better yet if the defendant could be sent to a psychiatric hospital for detailed study.

Karpman, *On Reducing Tensions and Bridging Gaps between Psychiatry and the Law*, 48 J. Crim. L., C. & P.S. 164, 171 (1957).

Against this standard Dr. Compton's efforts can be assayed. He interviewed petitioner twice, once in his office shortly after petitioner was arrested and a second time in jail a few days before the trial (R. 57). These interviews were, as Dr. Compton testified, accurately described as "consultation" (R. 58). Dr. Compton "took the history from him" but the history was so incomplete that the doctor did not know of petitioner's criminal record (R. 58). He made no physical examination nor any physical tests (R. 58). He stated specifically that he did not use the Rorschach test (R. 136), and it appears from the record that he did not give any other kind of psychological tests. Instead his examination was limited to questioning petitioner, "as far as lunacy, as to his orientation" (R. 135). He asked petitioner such questions as his name, birthdate and age, who was President of the United States, and who was Governor of Texas, whether he had had any hallucinations, and put to him simple mathematical problems to see if he was able to keep a train of thought (R. 63). On the basis of this

limited questioning, Dr. Compton felt prepared to testify that petitioner was of sound mind.

There was evidence in the record that questions such as Dr. Compton put to petitioner form a proper part of a mental examination, but that such questioning "does not give an adequate indication of the person's mental state because we have all of these other things to consider" and that "a person may very well fool you on the basis of a verbal interview" (R. 71-72). Indeed even without such testimony it might well be judicially noticed that a person is not necessarily sane because he knows the name of the President of the United States—nor insane because he does not. A recent Royal Commission has commented on such a superficial tool for diagnosis:

> The fact that a person does not know the difference between a King and a President or can name only one of the oceans of the world, which we have seen quoted on several certificates, seems in itself quite irrelevant to the question whether that person is mentally defective to the extent that he is incapable of managing himself or his affairs or that he requires supervision or control for his own protection or for the protection of others (to quote the present legal definitions of imbeciles and feebleminded persons). To mention such things among the grounds for the diagnosis gives the impression that it in fact depends on whether the patient possesses odd knowledge of that sort. Any ordinary person tends to mistrust the whole diagnosis if facts of that sort appear to play an important part in it.

Report of the Royal Commission on the Law Relating to Mental Illness and Mental Deficiency 276 (1957) (Cmnd. 169). That Dr. Compton was willing to give an opinion as

to petitioner's sanity on the basis of such a limited interview proves the truth of Isaac Ray's observation that "ignorance is always confident."

It is fair to conclude that the testimony offered in this case was not sufficient to permit a jury to form a meaningful judgment as to whether petitioner was sane.

II.

Commitment to a Mental Hospital or Examination by a Qualified Psychiatrist Are Widely Recognized as the Only Satisfactory Procedures for Determining Sanity.

Prior to trial in this case petitioner's counsel, fearful that petitioner would be denied the right to a fair trial because of his financial inability to provide himself with the necessary competent psychiatric testimony, moved alternatively that petitioner be sent to a mental institution for diagnosis and observation, or that the court appoint a competent independent psychiatrist to examine petitioner (R. 3-6). During the trial counsel again moved that the proceedings be suspended until petitioner could be sent to a mental institution for closer observation or in the alternative that the court appoint a psychiatrist or psychologist to examine petitioner (R. 136). These motions were not granted. Petitioner was thus denied what are widely recognized, by state legislatures and courts as well as by medical and legal writers, as the only satisfactory procedures to prepare for trial where sanity is seriously in issue.

In 23 states, as well as in the District of Columbia and in the federal courts, petitioner would have been granted the relief he sought. The statutes are summarized in Appendix A. They vary considerably in detail but the variations are not relevant in this case. Some apply only to repeated offenders, but petitioner amply satisfies that re-

quirement. Some provide for appointment of a psychiatrist to examine the accused, while others provide for commitment of the accused to a mental hospital for his examination, but either procedure would have met petitioner's need and he moved alternatively for each kind of help. In some states the psychiatrist is to report on the accused's ability to stand trial while in others the inquiry is as to his sanity at the time of the act in question, or at both times. Petitioner could not have been convicted if he were insane either when the coins were allegedly stolen or at the time of trial. Finally some of the statutes make such psychiatric examination mandatory while others give discretion to the trial court. Again the difference is unimportant for it would surely be an abuse of discretion to refuse such examination, where a statute makes it available, if the defendant has previously been adjudicated insane or hospitalized for mental illness. "* * * [N]o one can doubt that confinement in a mental institution upon an adjudication of mental illness is sufficient to generate in the minds of all of us a doubt sufficient to provoke inquiry." *Fitts* v. *United States*, 284 F.2d 108, 113 (10th Cir. 1960); *United States* v. *Walker*, 301 F.2d 211 (6th Cir. 1962).

Thus in 23 states, as in all federal courts, petitioner would have been examined by a psychiatrist. There is a second group of 10 states which provide for a pretrial examination where sanity is in issue, but do not specifically require that the examination be by a psychiatrist. Commonly these statutes speak of "disinterested qualified experts." These statutes are summarized in Appendix B. It is highly probable that the examination would be by a psychiatrist under these statutes, and indeed the authorities presented in Part I of this Brief demonstrate that a general practitioner could hardly be considered "qualified" for this purpose. However, since there is at least one decision under such a provision that psychiatrists are not

required, *State* v. *Reid*, 87 Ariz. 123, 348 P.2d 731 (1960), it is safer to treat this group of statutes separately, and to say only that petitioner would have been examined by a psychiatrist in 23 states and that the examination probably would have been by a psychiatrist in 10 other states.

It should be noted that in two other states the problem is recognized, but the provision for expert examination does not reach the circumstances of petitioner's case. Alabama provides for pretrial commitment for mental examination to the state hospital, but limits this to persons charged with a capital offense. *Ala. Code* (1940), tit. 15, §425. In Texas the Juvenile Court Act provides that the court may cause any person coming under its jurisdiction to be examined "by a physician, psychiatrist, or psychologist, appointed by the court". *Texas Civil Statutes*, Art. 2338-1, §16. Since petitioner was only to be sent to prison for life, and was neither a juvenile nor charged with a capital offense, he could not avail himself of statutes such as these, though the statutes show that the legislatures in question realize the desirability of truly qualified opinion.

In addition to the 33 states already mentioned in which petitioner either probably or certainly would have been granted the psychiatric examination he sought, it should be noted that in Alabama he could have subpoenaed a psychiatrist and compelled him to testify as to his opinion, without fee; *Ala. Code* (1940), tit. 7, §366, and that in Rhode Island the court has discretion to furnish criminal defendants with expert witnesses at the expense of the state. *R.I. Gen. Laws* (1956), §9-17-19.

Statutes of the sort here described have been enthusiastically hailed by courts and commentators. In *Jessner* v. *State*, 202 Wis. 184, 194, 231 N.W. 634, 638 (1930), the leading case upholding the constitutionality of such legislation, the Wisconsin court said:

> The function of these experts is to aid in the administration of justice, by furnishing reliable and unprejudiced opinions upon a technical subject. The whole purpose of their creation and appointment is to promote the accomplishment of the very purposes for which courts are established.

A year later, a California court said that the then new California statute providing for court appointment of experts to determine the mental condition of an accused "is in aid of truth, which the court is seeking in order to determine the controversy with justice to all." *People* v. *Strong*, 114 Cal. App. 522, 526, 300 Pac. 84, 85 (1931). The South Carolina court had this to say of its statute providing for commitment to the state hospital for examination whenever a question is raised as to mental disease of a criminal defendant:

> The foregoing statute, which has been in force a long number of years, represents quite a forward step in judicial procedure where there is any question as to the responsibility of an accused for a criminal act. It enables the court to secure technical evidence relating to his mental condition from an unprejudiced and reliable source and makes available to both the prosecution and defense expert evidence free from any possible sentiment of loyalty to either side. An examination under this statute is a distinct aid in the administration of justice.

State v. *Myers*, 220 S.C. 309, 311, 67 S.E.2d 506, 507 (1951). The Pennsylvania Supreme Court, speaking of the examination of the defendant by a psychiatrist and a psychologist from the Allegheny County Behavior Clinic, said:

> The modern tendency to utilize the services and testimony of specially trained professional people designated by the court itself, particularly in criminal trials where insanity is pleaded, is generally recognized as a progressive step which brightens the light of truth and reduces immeasurably the darkness of uncertainty.

Commonwealth v. *Butler*, 405 Pa. 36, 45, 173 A.2d 468, 473 (1961). The newest statute of this type was adopted in Mississippi in 1960. The court there joined in the chorus of praise, saying that the statute "was passed for a salutary purpose to avoid a defendant's ever being placed on trial for crime in this state unless he is at the time of trial capable of conducting a rational defense by intelligently conferring with his counsel as to the facts in connection with the crime." *McGinnis* v. *State*, 241 Miss. 883, 133 So.2d 399, 401 (1961).

In addition to the 33 states which have statutes which would reach petitioner's case, psychiatric court clinics exist to assist the court by making such examination available in many cities, including some, such as Chicago, where there is no state statute authorizing pretrial psychiatric examination. Note, *Psychiatric Court Clinics*, 29 Temp. L.Q. 347 (1956). The practice here urged as desirable is widely followed in other civilized countries. In Canada, despite some difficult problems of statutory construction, it is apparently the practice to commit defendants of questionable sanity to a mental hospital for 30 days for examination. Menzies, *Procedure Under Criminal Code Respecting Insane or Mentally Ill Prisoners*, 1 Crim. L.Q. 335 (1959). In England the Poor Prisoners Defence Act, 1930, 20 & 21 Geo. V, c. 32, as amended by the Legal Aid and Advice Act, 1949, 12 & 13 Geo. 6, c. 51, puts on the government the burden of the expenses of the defense of an indigent accused, but there are also limited commitment provisions

in the Mental Health Act, 1959, 7 & 8 Eliz. 2, c. 72, §§ 72, 73. See Williams, *The Mental Health Act, 1959*, 23 Modern L. Rev. 410, 412 (1960). Chief Judge John Biggs, Jr., has surveyed the practices in Europe. Biggs, *Procedures for Handling the Mentally-Ill Offender in Some European Countries*, 29 Temp. L.Q. 254 (1956). It appears from Judge Biggs' study that in Sweden there is a compulsory psychiatric examination of criminal defendants whenever the defendant has previously suffered from mental disease or is to be detained as a recidivist or there is any other reason to suspect the existence of mental disorder. Denmark follows a similar policy; the mental examination is as thorough as the situation requires, and may cover as long as six months. In Norway whenever a question of sanity is raised two psychiatrists with forensic experience are selected from an approved panel to make an examination, which includes a complete case history and use of the electro-encephalograph and the Rorschach and other tests. In Belgium a scientific examination by a psychiatrist is always made in serious criminal cases. In Italy and in Switzerland if there is any doubt as to defendant's responsibility a mental examination may be ordered at any stage of the proceedings. An examination lasting usually about six weeks is made by psychiatrists in the Netherlands whenever considered advisable. Court-appointed psychiatrists examine the accused in Germany whenever the reasons given either by the state or the defendant justify such a procedure. Judge Biggs concludes, at 263:

> It is apparent from a review of European legal systems that many countries are making use of scientific and humane procedures for handling the mentally-ill criminal; that this is being done without abnegation of the criminal law or chaos resulting therefrom and with no intention of changing these procedures for harsher

> and antiquated measures. In other words, although recognizing the handicaps of a shortage of forensic psychiatrists, insufficient equipment, and lagging public opinion, the authorities are of the view that these procedures are fundamentally sound and effective. * * * It is particularly important for us in America to consider what is being done in other forward-looking countries, with the thought of employing their knowledge and experience in improving laws and attitudes in the United States.

Statutory provision for mental examination of a criminal defendant, either by commitment to a state hospital for this purpose or the appointment of psychiatrists by the court, has frequently been recommended by respected professional groups. Perhaps the earliest such recommendation was made in 1915 by the American Institute of Criminal Law and Criminology, on the advice of its Committee on Insanity and Criminal Responsibility. After three years' study of the problem, this very distinguished committee, under the chairmanship of Professor Edwin R. Keedy, and including four eminent psychiatrists, a judge, and a law school dean, proposed a bill giving courts authority to summon one or more distinterested qualified experts, or to commit the accused to the state hospital for observation, whenever the existence of mental disease or derangement becomes an issue in the trial of a case. Keedy, *A Bill to Regulate Expert Testimony*, 5 J. Amer. Inst. Crim. Law 643 (1915). Dean Wigmore, noting the distinction of the committee which made this proposal, said that "our profession can afford to give full faith and credit to the proposal of such a body," and observed of the recommendations the committee had made:

> They are measures which the medical profession has long demanded. The perverse thing about our law

> has been that it flew in the face of facts. It has complacently expected to get at the truth without methods which are always used in getting at the truth in ordinary scientific practice.

Wigmore, *The Bill to Regulate Expert Testimony*, 9 Ill. L. Rev. 353, 354-355 (1914).

A proposal in similar vein was made by Dr. Vernon L. Briggs in 1921. Briggs, *The Manner of Man That Kills* 16-18 (1921), and led to enactment in Massachusetts that year of the much-admired Briggs Law, *Mass. Laws* (Supp. 1961), c. 123, §100A. Experience under that statute was extremely successful. Glueck, *Psychiatric Examination of Persons Accused of Crime*, 36 Yale L.J. 632 (1927); Kreutzer, *Re-examination of the Briggs Law*, 39 Bos. U.L. Rev. 188 (1959). This experience heightened the interest of other professional groups in such reform.

In 1928 the American Psychiatric Association, again on the advice of an able committee under the chairmanship of Dr. Karl A. Menninger, called for adoption of "legislation such as the recent Massachusetts enactment and the expert testimony bill of the American Institute for Criminal Law which put the psychiatrist in a position of counselling the legal authorities as to the disposal of social offenders, implying the development of the necessary machinery (clinics, court psychiatrists, etc.)." The Association further endorsed: "The court appointment from a qualified list, of the psychiatrists testifying in regard to mental status, mechanisms or capabilities of a prisoner, with opportunity for thorough psychiatric examination using such aids as psychiatrists customarily use in practice, clinics, hospitals, etc., with obligatory written reports and remuneration from public funds." Menninger, *Medicolegal Proposals of the American Psychiatric Association*, 19 J. Crim. L. & Criminology 367, 376 (1928). Similar provisions were endorsed

by the American Law Institute in 1930. A.L.I., *Code of Criminal Procedure* §308 (1930).

A committee of the Judicial Conference of Senior Circuit Judges, under the chairmanship of Judge Calvert Magruder, referred in its 1944 report to the need for "the advice of trained psychiatrists * * * in the detection of mental disorders which may not be readily apparent to the eye of the layman." *Report of Committee to Study Treatment Accorded by Federal Courts to Insane Persons Charged with Crime*, Sept. 1944, p. 5. This committee's study led to the approval by the Judicial Conference in 1946, *Report of the Judicial Conference of Senior Circuit Judges* 18 (1946), and adoption by Congress in 1949, of legislation providing for psychiatric examination of federal prisoners. *Act of Sept. 7, 1949*, c. 535, §1, 63 Stat. 686, 18 U.S.C. §§4244-4248.

A comprehensive study of this problem was made in 1954 for the Group for the Advancement of Psychiatry by its Committee on Psychiatry and Law. That group declared that "in the interest of a comprehensive criminal justice, psychiatric expert testimony is indispensable," and said:

> Hurried examinations and observation of offenders in prison cells, commonly without privacy, in some instances in the presence of an attorney, are conducive neither to good psychiatry nor as a career incentive to the well-trained psychiatrist.
>
> The Committee submits that good court psychiatry requires no less than the minimum standards of civil practice. Minimum standards are as follows: a. Observation of the offender in a facility under psychiatric examination. b. A minimum-maximum term of observation to be determined by mutual agreement between the Courts and the psychiatric facility. c. Provision of

> facilities for psychologic testing. d. Provision for social service case work. e. Provision for laboratory adjuncts, including electro-encephalography. f. Provision for consulting services of medical specialists. g. Organization of such services to operate in accordance with established standards of practice, diagnosis, supervision, and reporting; to provide for interval evaluations and to promote teaching and social science research.

This Committee, like every other similar group, concluded by recommending a bill which would permit a court to designate psychiatrists to examine accused persons and testify as to their mental condition. The Committee on Psychiatry and Law of the Group for the Advancement of Psychiatry, *Criminal Responsibility and Psychiatric Expert Testimony*, Report No. 26, May 1954, pp. 6-8.

The American Bar Foundation concluded in 1961 a study of the problems of the mentally disabled and the law. Its recommendation on this particular problem was:

> Any accused raising the defense of irresponsibility should undergo a thorough mental examination by a panel of impartial experts. This type of examination performs a dual function. First, it removes the label "rich man's defense" from the insanity plea by providing expensive psychiatric testimony to the accused, who otherwise may lack the necessary funds. Second, it would tend to eliminate the "battle of the experts" by offering to the jury a neutral body of psychiatric testimony.

Lindman & McIntyre, *The Mentally Disabled and the Law* 366 (1961).

Finally in 1962 the American Law Institute gave final approval to its Model Penal Code. Section 4.05 of that Code,

in line with all modern thinking, provides that whenever a defendant raises the defense of mental disease or defect excluding responsibility, or there is other reason to doubt the defendant's fitness to proceed or to believe that his mental condition will become an issue in the case, the court shall appoint at least one qualified psychiatrist to examine the defendant, and may order him committed to a hospital or other suitable facility for such examination. A.L.I., *Model Penal Code* §4.05 (Proposed Official Draft, 1962). For commentary on this proposal, see A.L.I., *Model Penal Code* 195 (Tent. Dr. No. 4, 1955).

As the professional groups have been aware, experience under statutes such as they propose has demonstrated the unsoundness of fears that psychiatrists, if given a free hand, would find practically all accused persons insane. In the first 14 years of the Briggs Law in Massachusetts, only 13.8% of all defendants examined were reported to be either definitely abnormal mentally or in such condition that observation in a mental hospital was deemed advisable. Overholser, *Psychiatry and the Law*, Encyclopedia of Criminology 394, 396 (Branham & Kutash eds. 1949). Comparable results have been reported in Colorado. Weihofen, *An Alternative to the Battle of Experts: Hospital Examination of Criminal Defendants Before Trial*, 2 L. & Contemp. Prob. 419 (1935).

A procedural provision enthusiastically supported for nearly a half century by such groups as the American Institute of Criminal Law and Criminology, the American Psychiatric Association, the Judicial Conference of Senior Circuit Judges, the Group for the Advancement of Psychiatry, the American Bar Foundation, and the American Law Institute, may well be thought "indispensable," as one of those groups said, to the fair administration of justice. "* * * [A] pre-trial mental examination of an

accused of doubtful competency is absolutely essential if we are to avoid trying the incompetent * * *." Note, 51 Geo. L.J. 143 (1962). Distinguished legal writers, from Wigmore to the present, have agreed with the professional groups as to how such an examination should be made available. They urge the discard of "outmoded, inefficient and unfair procedures." Mueller, *Procedure to Determine Responsibility and Fitness to Proceed in Criminal Cases*, 3 Crim. L. Rev. 29, 44 (1956), and the adoption of procedures such as those already in effect in more than half of the states. See, *e.g.*, Weihofen, *Eliminating the Battle of Experts of Criminal Insanity Cases*, 48 Mich. L. Rev. 961, 974 (1950); Ploscowe, *Suggested Changes in the New York Laws and Procedures Relating to the Criminally Insane and Mentally Defective Offenders*, 43 J. Crim. L., C. & P.S. 312 (1952); Goldstein & Fine, *The Indigent Accused, the Psychiatrist, and the Insanity Defense*, 110 U. Pa. L. Rev. 1061 (1962); Glueck, *Law and Psychiatry: Cold War or Entente Cordiale?* 74 (1962); Comment, *Professor George H. Dession's Final Draft of the Code of Correction for Puerto Rico*, 71 Yale L.J. 1050, 1136 (1962). A member of this Court has well summarized the unanimous view of modern authority on this question:

> The experience in Massachusetts and in California, shows, I think, that the successful cooperation of law and psychiatry in the field of criminal law is greatly enhanced once the experts are selected by strict professional standards, once they are neutral and impartial, and once the law is administered in an even-handed way, bringing the psychiatrist into the run of cases, not solely into those cases that are hand-picked by the judges or the lawyers.

Douglas, *The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists*, 41 Iowa L. Rev. 485, 493-494 (1956).

The combined judgment of the legislatures of more than half of the states, the Congress of the United States, many foreign countries, the most distinguished legal and psychiatric professional associations, and eminent legal scholars, is that a case in which insanity is a defense cannot be fairly tried unless the state makes provision for psychiatric examination of the defendant.

III.

The Fourteenth Amendment Requires the States to Provide an Indigent Defendant With Psychiatric Examination Where Sanity Is Seriously in Issue.

When the American Law Institute was discussing the provisions of the Model Penal Code dealing with mental illness as a defense, the Reporter, Professor Herbert Wechsler, described §4.05 of the Code, providing for psychiatric examination of accused persons, as "the heart of this matter." *A.L.I. Proceedings* 225 (May 21, 1955). There is much professional ferment at the present time as to the proper test for criminal responsibility. The M'Naghten rules, the Durham test, the Currens test, and the A.L.I. test all claim staunch adherents. The test which the jury is to apply makes no difference if the jury does not have the information to make a sensible application of any test. Professor Sheldon Glueck has spoken recently of "the vital significance of adequate *procedural* provisions in the administration of the tests." Glueck, *Law and Psychiatry: Cold War or Entente Cordiale?* 74 (1962). He says further:

> Were the jury allowed to project the knowledge and irresistible impulse tests against the background of unhampered psychiatric reports on the accused's condition and history—made as is done by a trained and experienced practitioner of mental medicine when he

> observes and examines the patient thoroughly, applies the necessary medical, psychological, chemical and biological tests, and takes a reliable history of hereditary and developmental involvements—then the jury might more effectively and fairly apply *whatever* yardstick of irresponsibility the jurisdiction has put its faith in.

Id. at 61-62.

The Constitution of the United States requires no less. It requires that provision be made to give the jury, in cases where sanity is seriously in issue, the information which is necessary to the formation of a meaningful resolution of that issue.

> A denial of adequate opportunity to sustain the plea of insanity is a denial of the safeguard of due process in its historical procedural sense which is within the incontrovertible scope of the Due Process Clause of the Fourteenth Amendment.

United States ex rel. Smith v. *Baldi*, 344 U.S. 561, 571 (1953). Though the quoted remark was uttered in dissent, it is believed that the majority in *Smith* would agree with the principle stated. A year later the Court was unanimous in *Massey* v. *Moore*, 348 U.S. 105 (1954), in holding that the Constitution requires an adequate hearing on a question of insanity. See also *Snider* v. *Smyth*, 263 F.2d 372 (4th Cir. 1959), where on habeas corpus the Fourth Circuit remanded a case with directions to arrange for a mental examination, preferably with the cooperation of the Commonwealth of Virginia in a state hospital, even though the defendant's attorneys had never properly raised the issue of sanity in any proceedings. Only recently the judges of that court have read *Smith* v. *Baldi* as authority for the proposition that "there is little doubt that the state must provide an adequate means by which an accused can

raise the issue of insanity," and that the state must provide "cautious investigation" of a defendant's mental condition before trial. *Pannell* v. *Cunningham*, 302 F.2d 633, 634, 635 (4th Cir. 1962).

The present petitioner did not have an adequate opportunity to sustain the plea of insanity. Though he has once been judged to be insane, and is presumed by Texas law still insane, he was found sane by the jury after a trial in which there was no qualified evidence as to his mental condition. He was denied the procedural protections which are regarded by all experts who have studied the subject, and by the lawmakers in a majority of the states, as necessary to a fair determination of whether he can be held criminally responsible. A proceeding which finds a man sane, and results in a life sentence to the penitentiary, in the absence of any expert evidence as to his sanity, is so lacking in fundamental fairness as to be a denial of liberty without due process of law, contrary to the Fourteenth Amendment.

The Texas Court of Criminal Appeals believed that to grant petitioner the constitutional right which he claimed there, as here, would be "to extend" the holding of *Smith* v. *Baldi* (R. 160). It relied on a single sentence in the *Smith* case, taken out of context, in which this Court said: "We cannot say that the State has that duty by constitutional mandate." 344 U.S. at 568. Quotation of the full paragraph of the *Smith* opinion, from which the Court of Criminal Appeals extracted but a sentence, illustrates that the holding there is not contrary to the present petitioner's contention, and indeed that the language of the Court supports what is here sought:

> This brings us to petitioner's second point: That the assistance of a psychiatrist was necessary to afford him adequate counsel. The record of the trial-court

> proceedings reveals that on November 5, 1948, a psychiatrist, who had examined petitioner at the court's request, testified as to petitioner's sanity at the time of the trial and at the time of the commission of the crime. In addition, on October 28, 1948, two other psychiatrists were called by the defense to testify as to petitioner's mental competence. On the same day petitioner's counsel also introduced various reports and letters dealing with his client's mental history. On this evidence the court determined his sanity. Petitioner further asserts that he should have been given technical pretrial assistance by the State. Although the trial judge testified that defense counsel made no such request, petitioner here states that the trial court refused to appoint a psychiatrist to make a pretrial examination. We cannot say that the State has that duty by constitutional mandate. See McGarty v. O'Brien, 1 Cir., 188 F.2d 151, 155. As we have shown, the issue of petitioner's sanity was heard by the trial court. Psychiatrists testified. That suffices.

344 U.S. at 568. The very evidence which the Court held "suffices" in the *Smith* case was denied to petitioner in the instant case. He was found to be sane, contrary to the prior adjudication of insanity, solely on the basis of the opinions of lay witnesses and of a doctor with no specialized training in mental ills. Psychiatrists testified in Smith's case. They did not in Bush's case, despite his repeated requests for such testimony.

This reading of the *Smith* case is strengthened by the Court's reliance there on the decision of the First Circuit in *McGarty* v. *O'Brien*, 188 F.2d 151 (1st Cir. 1951). The petitioner for habeas corpus in that case had been convicted of a crime in Massachusetts. Prior to trial he had been examined by two psychiatrists designated by the State

Department of Mental Health, pursuant to the Briggs Law of that state. *Mass. Laws* (Supp. 1961), c. 123, §100A. At page 155, the page cited by this Court in referring to the *McGarty* case, the First Circuit said:

> "This is not a case where the state has refused to provide an impartial psychiatric examination of the accused with a view to determining his sanity and criminal responsibility. Quite the contrary, in compliance with a mandatory provision of law, the state has, at public expense, provided such examination by two impartial experts; and their joint report has been made available to the defense. The doctors designated by the Department of Mental Health to make the examination are not partisans of the prosecution, though their fee is paid by the state, any more than is assigned counsel for the defense beholden to the prosecution merely because he is, as here, compensated by the state.

The holding in *McGarty* is that where the state has provided a psychiatric examination, and there is no challenge of the professional standing and competence of the psychiatrists, nor of their complete impartiality or the thoroughness of their examination, 188 F.2d at 157, the state has met the requirements of the Fourteenth Amendment. Texas provided the present petitioner with no such benefits.

The *Smith* and *McGarty* cases suggest, as a minimum compulsion of due process under the Fourteenth Amendment, that in a case where insanity is seriously in issue, the state must make available testimony by competent psychiatrists who are completely impartial and who have made a thorough examination. Such a requirement is not unduly burdensome on the state, as is evident from the fact that more than half of the states have chosen voluntarily to provide due process for persons in petitioner's

situation by authorizing psychiatric examination. No particular procedural provision is needed. "Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for their performance of their duties. * * * This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause." *In re Peterson*, 253 U.S. 300, 312 (1920); Comment, *The Trial Judge's Use of His Power to Call Witnesses—An Aid to Adversary Presentation*, 51 Nw. U.L. Rev. 761 (1957). Even before passage of the 1949 statute authorizing psychiatric examination of defendants in federal court, it was usual practice in the district courts to order, with the defendant's consent, commitment for such an examination. *United States* v. *Harriman*, 4 F. Supp. 186 (S.D.N.Y. 1933); *cf. State* v. *Mulrine*, 183 A.2d 831 (Del. Super. 1962). Under a statute which authorized mental examination as to the accused's capacity to assist in his own defense, a federal court has been held to have power to order examination also as to the accused's mental state at the time of the crime, where the accused is without the financial and intellectual resources to obtain the evidence on his own. *Winn* v. *United States*, 270 F.2d 326 (D.C. Cir. 1959). Nor is it relevant that "the Court had no fund or money for so-called psychiatrists, alienists, quacks or specialists" (R. 38). It is "a principle of medical ethics that the indigent always have a call on a doctor for his free services." Davidson, *Forensic Psychiatry* 246 (1952). Surely this principle would apply also where a court seeks the aid of a psychiatrist so that it may do justice to an indigent. In the early days of the Briggs Law in Massachusetts public-spirited practitioners performed the examinations without any compensation at all. They are now paid $7 for each examination, but as a commentator says,

with dry understatement, "this amount is so out of line with present day charges in private practice that it cannot be a significant factor in securing the services of competent psychiatrists." Kreutzer, *Re-examination of the Briggs Law*, 39 Bos. U.L. Rev. 188, 197 (1959). Despite the public image which Texans sometimes give, it cannot be doubted that in Texas, as in Massachusetts, there are public-spirited psychiatrists who would serve without fee at the request of a court until such time as the Texas legislature follows the lead of 35 other states and makes provision for a fee in such situations.

The state must give those protections required by the Fourteenth Amendment, no matter what difficulties it may cause for the state, but that it will create no serious difficulties is relevant to a determination that a particular protection is in fact required by the Fourteenth Amendment. See *Mapp* v. *Ohio*, 367 U.S. 643, 659-660 (1961).

There is a further reason why the trial in the present case resulted in a denial of liberty without due process of law. Since *Powell* v. *Alabama*, 287 U.S. 45 (1932), it has been settled that there are some cases in which the right to court-appointed counsel is protected by the Fourteenth Amendment. Whatever may be the fate of the limitation on that rule first announced in *Betts* v. *Brady*, 316 U.S. 455 (1942), there is no doubt that the present case is within the *Powell* principle. Texas commendably recognizes, *Ex parte Bush*, 313 S.W.2d 287 (Tex. Cr. App. 1958), as indeed it must, *Massey* v. *Moore*, 348 U.S. 105 (1954), that the Fourteenth Amendment requires a state court to appoint counsel for a criminal defendant, even in a noncapital case, who is presumptively insane. In this case counsel was so appointed. But the right to counsel is meaningless if the lawyer is unable to make an effective defense because

he has no funds to provide the specialized testimony which the case requires.

> To make that right effective, counsel is obviously entitled to the aid of such expert assistance as he may need in determining the sanity of his client and in preparing the defense.

Ex parte Ochse, 38 Cal. 2d 230, 238 P.2d 561 (1951). In the *Ochse* case the issue was whether prison regulations could prevent examination of a defendant by a psychiatrist he had hired, but the California court's point about the necessity of such assistance to make the right to counsel effective is as valid where it is poverty that prevents psychiatric examination as where it is a prison regulation which creates the bar.

If there are grave indicia of mental disease, and it appears that counsel cannot prepare his client's case properly without the aid of a psychiatrist, one must be appointed by the court if due process is to be had. To require the appointment of counsel for an indigent accused is to require the appointment of counsel learned in the law, a member of the bar. The requirement of due process, as set out in *Powell* v. *Alabama*, would not be met by the appointment of a layman as counsel. The appointment of counsel for a deaf mute would not constitute due process of law unless an interpreter also was available. Nor does the appointment of counsel learned in the law fulfill the requirement of due process if that counsel requires the assistance of a psychiatrist in order to prepare an insane client's defense. A modern and realistic approach to the problem of the insane defendant requires psychiatric assistance for his counsel at least under some circumstances. Concepts of due process change and as civilization progresses our ideas of fundamental fairness necessarily enlarge themselves.

The preceding paragraph is based on the opinion of Chief Judge Biggs for himself and two others, in *United States ex rel. Smith* v. *Baldi*, 192 F.2d 540, 559-560 (3d Cir. 1951). Since Judge Biggs was writing in dissent, and this Court affirmed the holding of the majority in that case, his observations cannot be regarded as "authoritative." It is difficult, however, to think of any persuasive answer to the argument he advances. The difficulty is illustrated by the decision of the Arizona Supreme Court in *State* v. *Crose*, 88 Ariz. 389, 392, 357 P.2d 136, 138 (1960):

> We have no doubt that court appointed counsel in cases such as this often face grave difficulties in matching, on behalf of their clients, the resources available to the prosecution. It is also certainly true, as a practical matter, that the assistance of experts in advance of trial often lies at the very heart of a successful defense. Nevertheless the constitutional right to counsel has never been construed to include such assistance.

In the *Crose* case there was psychiatric testimony as to defendant's sanity, and his claim was that the court should have appointed experts specifically for the defense. There may be merit in such a claim. See Goldstein & Fine, *The Indigent Accused, the Psychiatrist, and the Insanity Defense*, 110 U. Pa. L. Rev. 1061, 1071-1076 (1962). We do not make such a claim in the present case. We insist only that some psychiatric evaluation of the defendant's condition should have been made available to the court and to counsel. Whether the *Crose* case was decided correctly or not on its particular facts need not concern us in the present case, but the Arizona court's assertion that due process does not call for that which it concedes "often lies at the very heart of a successful defense" demonstrates the strength of Judge Biggs' argument that, in cases of this

sort, the appointment of counsel is meaningless without the provision of some form of psychiatric assistance.

We suggested earlier that the *Smith* and *McGarty* cases define a minimum compulsion of due process. The *Smith* case is not, however, the last decision from this Court relevant to the present case. In the year *Smith* was decided, the late Judge Jerome N. Frank observed that "a man may be jailed for life, or even electrocuted, because he hasn't the money to discover a missing document necessary to win his case or to employ a competent hand writing expert or psychiatrist." Such a situation, in Judge Frank's view, "makes a farce of 'equality before the law.'" Frank, *Today's Problems in the Administration of Criminal Justice*, 15 F.R.D. 93, 101 (1953). A similar view had been expressed about the same time by two experts on the relation of psychiatry and law:

> The wealthy litigant can summon experts of a caliber his poor opponent cannot afford. In criminal cases only the defendant with money can afford to purchase expert evidence equal to that which the prosecution, with all the resources of the state behind it, can obtain. The spectacle of a wealthy defendant presenting the insanity defense bolstered by the testimony of high priced experts produces a not unnatural cynicism regarding the reality of our ideal of "equal justice under law."

Guttmacher & Weihofen, *Psychiatry and the Law* 252 (1952). Similarly the American Bar Foundation recommends psychiatric examination at public expense because such a plan "removes the label 'rich man's defense' from the insanity plea . . . ." Lindman & McIntyre, *The Mentally Disabled and the Law* 366 (1961).

This Court took a long step toward ending the "farce" of which Judge Frank spoke by its decision in *Griffin* v. *Illinois*, 351 U.S. 12 (1956). Patently the problem in *Griffin* was quite different from that in the present case, but the rationale of the *Griffin* holding is concisely stated at 19:

> There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.

To hold that the present petitioner can be found sane, despite the prior adjudication to the contrary, and can be sent to jail for life after a trial devoid of psychiatric testimony, though such testimony would surely have been heard were the defendant a man of means, would be to make the kind of trial a man gets dependent on the amount of money he has, and would be a denial of the equal protection of the laws.

There is a discernible movement in the courts away from such a squalid discrimination against the impoverished defendant. It is held that the government will provide handwriting experts for the defense. *Bandy* v. *United States*, 296 F.2d 882, 888 (8th Cir. 1961); *United States* v. *Fox*, 19 F. Supp. 463 (S.D.N.Y. 1937). The claim that there is a constitutional right to the appointment of an accountant to assist an indigent indicted for income tax evasion was rejected by the Seventh Circuit only on the ground that the trial court's dismissal of the case, for want of such assistance, was premature. *United States* v. *Brodson*, 241 F.2d 107 (7th Cir. 1957). Dissenting from even that limited holding, Judge Finnegan put vividly the contention which petitioner is advancing in this case:

> If society merely wants automatic convictions then a hamstrung defense will facilitate achievement of that shabby aim, but if society desires that courts engage

> in a search for truth, before punishing, then I would avoid being stingy with defense materials.

Id. at 115.

The need for assistance to the defense of indigents is especially pressing where sanity is in issue. The court-appointed attorney, working for at best a very modest fee, can, by his own devoted effort, accomplish much which in other cases would require a substantial financial outlay. He can hunt for witnesses himself if there are no funds for investigators. He can acquire a sufficient familiarity with the principles of accounting to make an understandable presentation of the defense. But the lawyer cannot make himself into a psychiatrist,* nor provide without help the psychiatric testimony which an issue of sanity requires.

> The preparation of the psychiatric evidence which is required to prove an individual's mental condition at some past date is a very difficult task. It is a task for which the accused generally lacks both financial and intellectual capacity. * * *
>
> Indigent defendants of questionable mental capacity are obviously in no position to conduct these inquiries and whatever others may prove necessary. Their court-appointed attorneys are given no funds for the purpose. If the relevant facts are to be presented to the court, therefore, it must ordinarily be as a result of inquiries instituted by the Government.

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* The lawyer who attempts to do so is likely to share the frustration expressed by Sir James Fitzjames Stephen: "I have read a variety of medical works on madness, but I have found the greatest difficulty in discovering in any of them the information of which I stood in need; namely, a definite account of the course of symptoms collectively constituting the disease." 2 Stephen, *History of the Criminal Law of England* 131 (1883).

Williams v. *United States*, 250 F.2d 19, 23-24 (D.C. Cir. 1957).

In the United States, Judge Frank tells us, "We must face a shocking fact: a man may be convicted when his only crime is that of being poor." Frank & Frank, *Not Guilty* 86 (1957). To the extent that this is true, it is a denial of the great guaranty of equal protection of the laws. The Equal Protection Clause and the Due Process Clause, singly and together, require that where sanity is seriously in issue, the state make available to an indigent defendant the kind of psychiatric examination and testimony which is universally recognized as providing the only sound basis for an adequate determination of the defendant's responsibility.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed and the case remanded for a new trial after adequate psychiatric examination of petitioner.

Respectfully submitted,

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APPENDIX A

Statutes Providing for Examination by a Psychiatrist

Arkansas Statutes (Supp. 1961) 43-1301: Whenever the defense of insanity has been raised in a criminal case or the judge is of opinion that there are reasonable grounds to believe that the defendant was insane at the time of the alleged offense or has since become insane, "the judge shall postpone all other proceedings in the case and shall forthwith commit the defendant to the Arkansas State Hospital for nervous diseases, where the defendant shall remain under observation for such time as the court shall direct, not exceeding one month. The judge shall order the superintendent or supervising officer of the state hospital to direct some competent physician or physicians employed by the state hospital to conduct observations and investigations of the mental condition of the defendant, and to prepare a written report thereof. * * *."

California Penal Code 1027: "When a defendant pleads not guilty by reason of insanity the court must select and appoint two alienists, at least one of whom must be from the medical staffs of the state hospitals, and may select and appoint three alienists, at least one of whom must be selected from such staffs, to examine the defendant and investigate his sanity. It is the duty of the alienists so selected and appointed to examine the defendant and investigate his sanity, and to testify, whenever summoned, in any proceeding in which the sanity of the defendant is in question. * * *"

Colorado Revised Statutes (Supp. 1961) 39-8-2(1): "Upon the making of such plea of insanity, the judge shall forthwith commit the defendant to the Colorado psychopathic hospital at Denver or to the state hospital at Pueblo, or to such other institution as may be designated hereafter by law, where he shall remain under observation

and examination, by physicians who are specialists in mental diseases, for such time as the court may direct, not exceeding one month, or the judge, in lieu of such commitment, may forthwith appoint a commission of one to three physicians who are specialists in mental diseases, resident or having offices in, or not more than thirty miles distant from the town or city in which the case is pending, to examine the defendant at the jail in which he is confined or at such other place as may be designated by the judge, such examination to be completed within one month after such appointment."

Delaware Code (1953), tit. 16, §5142(c): the state mental hygiene clinic "may likewise observe, examine, study, and treat any person charged with any offense in, or subject to the jurisdiction of, any court within the State, when requested to do so by a judge or judges thereof."

Hawaii Revised Laws (1955) §258-36: "Whenever a person has been indicted for a felony by a grand jury, the judge of the court in which such person is to be tried for such offense may, in his discretion, before any trial on the criminal charge, cause such person to be examined by the psychiatrist or any designated psychiatrist of the territorial hospital or the director of the bureau of mental hygiene and by two additional unbiased physicians who in the opinion of the judge are qualified as examiners in insanity, with a view to determine the mental condition of such person and the existence of any mental disease or defect which would affect his criminal responsibility. In every such case such person shall by the order of the court be placed in detention in the territorial hospital or elsewhere as the court may direct for the purpose of such examination for a period of ten days or until completion of such examination if not concluded within the ten days, and the persons so making the examination shall file with the court their written report and opinions thereon, which report shall be accessible to the court, the prosecuting attorney and the attorney for the accused. * * * "

Kentucky Revised Statutes (1960) §203.340(1): "When a person who has been twice previously convicted of a felony, is indicted by a grand jury as an habitual criminal, the

circuit clerk of the court in which he is indicted shall give notice of the indictment to the Commissioner of Mental Health within seven days after the indictment is returned by the grand jury. The commissioner shall cause such person to be examined by a psychiatrist already in the employ of the department, to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. * * * *"

Maine Revised Statutes (1954) c. 27, §118: On a plea of insanity, any justice of the court before which defendant is to be tried "may, in vacation or term time, order such person into the care of the superintendent of either insane hospital, to be detained and observed by him until further order of court or any justice thereof, that the truth or falsity of the plea may be ascertained. * * *"

Maryland Code (1957), Art. 59, §7: "* * * The judge of the court, in which such indictment or information is pending, shall have full power and authority at any time, before trial, to order an examination of the mental condition of such person by the Department of Mental Hygiene * * *."

Massachusetts Laws (Supp. 1961) c. 123, §100A: "Whenever a person is indicted by a grand jury for a capital offense or whenever a person, who is known to have been indicted for any other offense more than once or to have been previously convicted of a felony, is indicted by a grand jury or bound over for trial in the superior court, the clerk of the court in which the indictment is returned, or the clerk of the district court, as the case may be, shall give notice to the department, which shall cause such person to be examined with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility. * * *"

Mississippi Code (Supp. 1960) §2575.5: "In any criminal action in the circuit court in which the mental condition of a person indicted for a felony is in question, the court * * * may order such person to submit to a mental examination by a competent psychiatrist selected by the court to determine his ability to make a defense; provided, however,

any cost or expense in connection with such mental examination shall be paid by the county in which such criminal action is pending."

New Hampshire Revised Statutes (1955) §135:17: Whenever the justice is notified by either party that there is a question as to the sanity of a criminal defendant, the justice "may, in term time or vacation, order such person into the care and custody of the superintendent of the state hospital, to be detained and observed by him until further order of the court, or until such person shall have been ordered discharged from the hospital by its trustees upon a report to them by the superintendent that such person is not insane."

New York Code of Criminal Procedure §658: "* * * [I]f the defendant makes a plea of insanity to the indictment, instead of proceeding with the trial, the court, upon its own motion, or that of the district attorney or the defendant, may in its discretion order such defendant to be examined to determine the question of his sanity." [It is provided in §659 that the examination is to be made by "two qualified psychiatrists."]

North Carolina General Statutes (Supp. 1961) §122-91: "Any alleged criminal indicted or charged with the commission of a felony may, on the order of the presiding or resident judge of the superior court, in or out of term, be committed to a State hospital for a period of not exceeding sixty days for observation and treatment. * * * ".

North Dakota Code (1960) §29-20-01: Whenever the court has reasonable ground to believe that a defendant "is insane or mentally defective to the extent that he is unable to understand the proceedings against him or to assist in his defense, the court immediately shall fix a time for a hearing to determine the defendant's mental condition. The court may appoint two disinterested qualified experts to examine the defendant with regard to his present mental condition and to testify at the hearing, or it may commit the defendant to the state hospital for the insane for observation and examination regarding his present mental condition. * * * " [There is a similar provision in §29-20-03 where sanity at the time of the offense is in issue.]

Ohio Revised Code (1953) §2945.40: "In any case in which insanity is set up as a defense, or in which present insanity of the accused is under investigation by a court or jury, the court may commit the defendant to a local hospital for the mentally ill, or the Lima state hospital, where the defendant shall remain under observation for such time as the court directs not exceeding one month. The court may in such case appoint one or more, but not more than three, disinterested qualified physicians, specialists in mental diseases, to investigate and examine into the mental condition of the defendant and testify as experts at his trial or other hearing. * * * "

Oklahoma Statutes (Supp. 1962) tit. 43A, §60: "If any person is held in confinement because of criminal charges, or if he has criminal charges pending or likely to be filed against him, or if he has been taken into custody because of a criminal act or acts, and the question arises as to his sanity or state of mental health, such individual may be ordered by a court of record having jurisdiction of the criminal proceedings into a State hospital within the Department for observation for a period not to exceed ninety (90) days."

Pennsylvania Statutes (1954) tit. 50, §1222: "Whenever any person charged with crime, upon production or appearance before the court, appears to be mentally ill or in need of care in a mental hospital, the court shall designate a responsible person to apply for his commitment, or for his commitment for observation, treatment and diagnosis, by order of such court, in accordance with the provisions of this act for the commitment of persons who are not convicted of crime or who have not been charged with crime." [§1225 states that the "psychiatric examination" is to be made by "two qualified physicians or a commission."]

South Carolina Code (Supp. 1960) §32-927: "Any judge of the circuit court, county court or juvenile-domestic relations court may order admitted to the State Hospital any person charged with the commission of any criminal offense who shall, upon the trial before him, be adjudged mentally ill or in whom there is a question as to the relation of mental illness to the alleged crime, whether this

question is raised by the prosecution or defense or appears to the judge from any evidence brought before him or upon his own recognition. * * * "

Tennessee Code (Supp. 1961) §33-513(5): When a defendant "is suspected of being mentally ill, the judges having criminal jurisdiction thereof shall have authority * * * after hearing, to commit said person to any mental institution in his district having facilities therefor, for observation, treatment, and hospital care for a period not exceeding thirty (30) days, and the cost of maintaining said prisoner in said institution shall be added to the costs of court in said cause."

Utah Code (1953) §77-24-17: "When a defendant gives notice of the defense of insanity, the court must select and appoint two alienists to examine the defendant and investigate his sanity. It is the duty of the alienists so selected and appointed to examine the defendant and investigate his sanity, and to testify, whenever summoned, in any proceeding in which the sanity of the defendant is in question. Said alienists so appointed by the court shall be allowed such fees as in the discretion of the court seem just and reasonable, having regard to the services rendered by the witnesses. * * * "

Vermont Statutes (1959) tit. 13, §4803: Whenever a plea of insanity is made, the court "may order the person into the care of the superintendent of the Vermont state hospital, to be detained and observed by the superintendent until further order of such judge, or of such county court, that the truth or falsity of such plea may be ascertained."

Wisconsin Statutes (1957) §957.27: "(1) Whenever, in any criminal case, expert opinion evidence becomes necessary or desirable the judge of the trial court may after notice to the parties and a hearing, appoint one or more disinterested qualified experts, not exceeding three, to testify at the trial. * * * (3) Whenever the existence of mental disease on the part of the accused, at the time of the trial, is suggested or becomes the subject of inquiry, the presiding judge of the court before which the accused is to be tried or is being tried may, after reasonable notice and

opportunity for hearing, commit the accused to a state or county hospital or asylum for the insane to be detained there for a reasonable time, to be fixed by the court, for the purpose of observation. * * * "

Wyoming Statutes (1957) §7-241: "In all cases where any plea of insanity is made, the judge shall forthwith order the commitment of the defendant to the Wyoming state hospital or other suitable institution, for observation and examination by the staff of said hospital and by such doctors and psychiatrists as either the State of Wyoming or the defendant may employ * * * "

United States Code, tit. 18, §4244, 63 Stat. 686: On motion of the United States Attorney alleging that a person charged with an offense may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceeding against him or properly to assist in his own defense, or similar motion by defendant, or on the court's own motion, "the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. * * * "

District of Columbia Code (1961) §24-301(a): Whenever "it shall appear to the court from the court's own observations, or from prima facie evidence submitted to the court, that the accused is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital. * * * "

APPENDIX B

Statutes Providing for Examination But Not Specifically Requiring a Psychiatrist

Arizona Rules of Criminal Procedure, Rule 250A: "* * * The court may appoint two disinterested qualified experts to examine the defendant with regard to his present mental condition and to testify at the hearing. * * *"

Connecticut General Statutes (Supp. 1961) §54-40: "* * * The judge may, if it appears advisable, appoint not fewer than two nor more than three reputable, disinterested and qualified physicians, who shall examine the accused as to his mental condition and make written report thereof to the court. * * *"

Florida Statutes (1957) §917.02: "When on a prosecution by indictment or information the existence of insanity on the part of the defendant at the time of the alleged commission of the offense charged becomes an issue in the cause, the court may appoint one or more disinterested qualified experts, not exceeding three, to examine the defendant. * * *"

Indiana Statutes (1956) §9-1702: "* * * When an insanity defense is pleaded, the court shall appoint two (2), or three (3), competent disinterested physicians to examine the defendant, and to testify at the trial. * * *"

Louisiana Revised Statutes (1950) §15-268: "Whenever, on a prosecution by indictment or information, the existence of insanity or mental defect on the part of the defendant at the time of the alleged commission of the offense charged becomes an issue in the cause, the court may appoint one or more disinterested physicians not exceeding three to examine the defendant. * * *"

Michigan Statutes (1954) §28.967: "When a person accused of any felony shall appear to be insane or shall have been quitted upon trial upon the ground of insanity, the

court, being certified by the jury or otherwise of the fact, shall carefully inquire and ascertain the issue of insanity. * * * The court shall call 2 or more reputable physicians and other credible witnesses to testify at said hearing * * *."

Oregon Revised Statutes (1961) §136.150: "* * * The court may appoint one or more disinterested qualified experts to examine the defendant with regard to his present mental condition and to testify at the hearing. * * *"

South Dakota Session Laws (1953) c. 201, §1: "* * * Upon a plea of 'not guilty by reason of insanity' the state shall thereupon be entitled to a reasonable time, as determined by the court, to prepare to meet such issue, and the court shall thereupon require the defendant to submit himself for examination by medical experts selected by the state. The court may also appoint medical experts and require that the defendant submit himself for examination by such court-appointed medical experts."

Virginia Code (Supp. 1960) §19.1-228: If the court or the Commonwealth's attorney has reason to believe that a person charged with crime is in such mental condition that his confinement in a hospital for the insane is necessary for proper care and observation, the court may make such commitment. "In any such case the court, in its discretion, may appoint one or more physicians skilled in the diagnosis of insanity, or other qualified physicians * * * not to exceed three, to examine the defendant before such commitment is ordered, make such investigation of the case as they may deem necessary and report to the court the condition of the defendant at the time of their examination. * * *"

West Virginia Code (1961) §6198: "Whenever any person charged with or convicted of a crime, or acquitted thereof because of his mental condition, is thought to be mentally ill or mentally defective, the judge of the court of record in which he was so charged, convicted, or acquitted, may on his own motion inquire into the mental condition of such person. * * * The judge shall appoint two physicians to examine such person and report in writing on his mental condition. * * *"